(2)

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILFRED CARTER,

Petitioner

v.

UNITED STATES,

Respondent

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent, Certified Grocers of California, Ltd.,[1] (hereinafter referred to as "Certified") respectfully prays that the Petition for Writ of Certiorari for review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case be denied.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are Petitioner Wilfred Carter and Respondent Certified Grocers of California, Ltd.

OPINIONS BELOW

The unpublished opinion of the court of appeals dated March 8, 1993 and the denial of the petition for rehearing, dated April 6, 1993, are reprinted in the Appendix, infra, as Appendices A and B, respectively. The decision and order of the United States District court dated April 30, 1991 is reprinted in the Appendix C, infra.

JURISDICTION

Carter failed to identify in his petition the statutory basis for jurisdiction of this Court. It is assumed that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

Carter's complaint alleged a violation of the Civil Rights Act, 42 U.S.C. §§ 1981 and 1983, thereby invoking jurisdiction of the United States District Court pursuant to its authority to adjudicate all actions arising under the laws of the United States, 28 U.S.C. § 1331.

The order of the United States District Court was entered on April 30, 1991. (Appendix C, infra.) The appeal thereof was timely filed pursuant to Rule 4(a)(1) of the Federal Rules of Appellate

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[1]Incorrectly stated as the "United States" in the caption of the Petition for Writ of Certiorari

Procedure ("FRAP") and properly brought before the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1294(1). The judgment of the court of appeals was entered on March 8, 1993 (Appendix B, infra) and a petition for rehearing was denied on April 6, 1993 (Appendix A, infra)

STATUTORY PROVISIONS INVOLVED

Rule 4(c)(2)(C) of the Federal Rules of Civil Procedure states:

"A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule --

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgement of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

Rule 4(d) of the Federal Rules of Civil Procedure provides, in pertinent part:

Summons and Complaint: Person to be Served. The

summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Rule 4(j) of the Federal Rules of Civil Procedure provides, in pertinent part:

"Summons: Time limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion."

Rule 55(b) of the Rules of Federal Procedure provides, in pertinent part:

Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the

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plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if he is not an infant or incompetent person.

Section 415.30 of the California Code of Civil Procedure provides, in pertinent part:

(a) A summons may be served by mail as provided in this section. A copy of the summons and of the complaint shall be mailed (by first-class mail or airmail, postage prepaid) to the person to be served, together with two copies of the notice and acknowledgement provided for in subdivision (b) and a return envelope, postage prepaid, addressed to the sender.

*** *** ***

(c) Service of a summons pursuant to this section is deemed complete on the date a written acknowledgement or receipt of summons is executed, if such acknowledgement thereafter is returned to the sender.

Rule 7.9 of the Local Rules of Practices for the United States District Court, Central District of California provides:

7.9 FAILURE TO FILE REQUIRED PAPERS -- Papers not timely filed by a party including any memoranda or other papers required to be filed under this rule will not be considered and may be deemed by the Court consent to the granting or denial of the motion, as the case may be.

Rule 7.16 of the Local Rules of Practices for the United States District Court, Central District of California provides:

7.16 MOTION FOR RECONSIDERATION -- A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law

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from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

STATEMENT OF FACTS

The underlying facts upon which Carter brought his complaint arise from his employment with Certified Grocers, which relationship began in 1977. However, the only facts pertinent to this Petition are the procedural facts set forth below.

Carter filed his complaint in this action on July 27, 1990. The complaint contained three causes of action for: (1) deceit; (2) intentional infliction of emotional distress; and, (3) violation of 42 U.S.C. §§ 1981 and 1983. On July 31, 1990, Carter attempted to serve the corporate defendant, Certified Grocers, and three individual defendants, by mailing only one copy of the summons and complaint to the corporate offices of Certified Grocers. The copy mailed to the corporate offices was not addressed to the corporate defendant, but rather was addressed to the three individually named defendants. Furthermore, it did not include copies of a notice and acknowledgement as required for service by mail.

On or about August 7, 1990, the district court, on its own motion, dismissed the pendant state law claims. On or about September 21, 1991, the court also apparently dismissed the

ndividual defendants from the lawsuit.

On September 5, 1990, Carter attempted to file a request for default judgment pursuant to Rule 55(b) of the Federal Rules of Civil Procedure ("FRCP"). Unbeknownst to Certified, the court had rejected the request on the ground that Certified was not in default status. On September 13, 1990, Certified Grocers, by special appearance, filed a notice of objection to Carter's request on the ground that Certified had never been properly served.

On September 20, 1990, Carter filed a request for entry of default against Certified alone. Carter alleged that service had been effectuated pursuant to FRCP 4(c) and California Code of Civil Procedure ("CCP") § 415.30 and FRCP 4(d)(ii). The default was entered by the Clerk on September 20, 1990 and on October 12 1990, Carter filed a notice and motion for default judgment.

On October 22, 1990, Certified served and filed an application for relief from entry of default, asserting that valid service of process had not been effectuated either pursuant to FRCP 4(c)(2)(C) or by CCP § 415.30 since the copy of the summons and complaint mailed to Certified's corporate offices did not include a notice and acknowledgement as required by either the federal or state rules prescribing the proper procedures to be followed for effectuating service by mail.[2] In addition, Certified noted that Carter's request was not accompanied by an affidavit presenting proof to the court clerk that Certified had been served as required by FRCP 55(a).

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[2]Certified did not address Carter's allegation that service had been effectuated pursuant to FRCP 4(d)(ii) because no such rule exists. In addition, Certified had been unaware of any attempts to personally serve it and thus determined FRCP 4(d) to be inapplicable to Certified's application for relief. Indeed, Certified specifically noted that no personal service "was ever attempted, nor has any proof of such service been filed" with the court.

On October 31, 1990, Carter filed a document entitled "notice of motion and notice of objection to defendant [sic] request for relief from entry of default" which, although couched in terms of a "motion," actually constituted an opposition to the application for relief. Although Carter's opposition alleged that Certified was "properly serviced pursuant to Federal Rules Civil Procedure 4(c) or California Procedure 415.30," he failed to offer any evidence whatsoever to support his contention. Nor did Carter ever attempt to allege that service had been effectuated in any other manner. Certified filed a reply to Carter's opposition and on November 26, 1990, the district court granted Certified's application for relief from entry of default.

On December 12, 1990, Carter filed a motion for new trial pursuant to FRCP 59(a) and (e). In his motion for new trial, Carter for the first time attempted to assert that Certified had been served by personal service. Certified opposed the motion on the ground that it was an improper motion in that there had not been a trial and that the motion was untimely since FRCP 59 provides that such motion must be filed within ten days of the entry of judgment. Certified further asserted that if the court were inclined to consider Carter's motion as a motion for reconsideration, it was likewise improper because the facts upon which Carter based his motion did not comply with the requirements of Rule 7.16 of the Local Rules for the United States District Court for the Central District of California ("Local Rules"). In support of its opposition, Certified presented the declaration of David Woodward who stated that he was Secretary-Treasurer of Certified and in that capacity, as agent of process, he had no record of ever receiving a copy of the summons and complaint except for the one copy mailed to the corporate offices. Carter did not file a reply to Certified's opposition or any objection to Woodward's declaration.

However, on January 22, 1991, before the court had ruled on he motion for new trial, Carter filed a motion for reconsideration ›ased upon the same facts presented in the pending motion for new rial. On January 24, 1991, the court denied Carter's motion for new rial, finding that Carter had not shown good cause for vacating the ›rior judgment. On February 8, 1991, Certified filed an opposition to he motion for reconsideration. Certified also filed a motion to lismiss Carter's complaint for failure to serve Certified within 120 lays of filing of the complaint pursuant to FRCP 4(j). Carter did not file an opposition to the motion to dismiss.

On February 26, 1991, the court denied Carter's motion for reconsideration noting that the facts upon which Carter's motion was based were the same facts upon which he had based his prior motion for new trial, which the court had likewise denied. On April30, 1991, noting that Carter had failed to file any opposition to Certified's motion to dismiss as required by the Local Rules, the court granted the motion on the ground that, pursuant to Local Rule 7.9, consent to the granting of a motion is deemed to have been given by failure to file an opposition thereto.

SUMMARY OF ARGUMENT

Certified contends that Carter has failed to present a compelling reason for this Court to grant his petition for writ of certiorari. The Ninth Circuit applied the correct law when it determined that it was without jurisdiction to review the district court's order setting aside the default because Carter has failed to raise it in his notice of appeal, and also applied the correct standard when it reviewed and affirmed the order of dismissal. Carter has not presented any argument or evidence which indicates the Ninth Circuit incorrectly applied or interpreted the law. To the contrary, the evidence establishes that if

any error occurred, it was occasioned by Carter's own failure to timely present facts and/or address issues.

ARGUMENT

I. Carter Has Not Cited A Special And Important Reason Upon Which This Court Should Grant The Petition.

Rule 10.1 of the Supreme Court Rules specifically provides that a review on writ of certiorari is a matter of judicial discretion and "will be granted only when there are special and important reasons therefor." The Rule then provides three reasons illustrative of when the granting of a petition will generally be considered:

> "(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> "(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> "(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court."

Carter asserts three grounds for seeking review by this Court.

Two of these grounds are substantially similar, and basically allege that Certified, either intentionally or otherwise, misrepresented facts to the district court in order to set aside the default and/or in obtaining dismissal of the complaint. The other ground alleges that the court erred in setting aside the default.

Neither of these grounds asserts a "special and important reason" as required by Rule 10. Indeed, the reasons given by Carter for requesting review do not involve any of the reasons exemplified in Rule 10. The ground specified in subsection (b) above clearly does not apply to this case, since this case does not involve the decision of a state court.

Additionally, Carter does not nor can not demonstrate that the decision of the Ninth Circuit in this case conflicts with the decision of any other federal court of appeals or state court, nor has it departed from the accepted and usual course of judicial proceedings. Indeed, as is discussed more fully below, the Ninth Circuit correctly applied and followed the accepted standard of review in this case. Rule 10.1(a) is therefore likewise inapplicable. Furthermore, Carter has not indicated any ground as specified in subsection (c) upon which this Court should grant the petition.

As this Court stated in Braxton v. United States, ___ U.S. ___, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991), the principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. That simply in not the case in the present proceeding. Since Carter has failed to cite any compelling reason for granting the petition, Certified asserts that the petition should be denied.

II. There Has Been No Misrepresentation Of Facts By Certified.

Assuming arguendo that Carter's petition is deemed to cite some compelling reason for granting review, the facts clearly demonstrate Certified has not misrepresented any facts. In its application for relief from entry of default, Certified argued that Carter had never correctly served Certified under either FRCP 4(c) or CCP § 415.30. These federal and state rules provide a method for service by mail, but also clearly provide that a copy of the summons must be provided to the person to be served and that it must be addressed to that person. In the present case, only one copy of the summons and complaint had been mailed to the offices of Certified Grocers but it was addressed to each of the individual defendants and not to Certified.

Once an attack as to the sufficiency of service of process has been made, the burden of proving proper service lies with the plaintiff. Norlock v. City of Garland, 768 F.2d 654, 656 (5th Cir. 1985). In his opposition to Certified's motion for relief from default, Carter did not attempt to identify under which rule he had in fact attempted service by mail. Certified had specifically and repeatedly argued that Carter had never attempted any alternate service of process beside service of process by mail. Carter failed to assert, argue or even allege that service had been attempted under any other manner or at any other time. Indeed, Carter never presented any evidence whatsoever refuting Certified's position, but merely continued to assert that service had been effectuated under both FRCP 4(c) and CCP
§ 415.30.

In addition, Certified had argued that Carter failed to comply with the requirements of FRCP 55(a) in seeking entry of default in that

Carter's request for entry of default did not include an affidavit by him as to how service had been effectuated. Carter's request for default merely stated that Certified had been served with summons and complaint, without even a scintilla of proof as to when or how such service was allegedly effectuated. Thus, Certified argued, based upon the information and facts then known to it, valid service had never been effectuated on Certified.

On November 26, 1990, the district court granted the motion for relief from entry of default on the basis that Carter failed to satisfy his burden of proving that Certified had been properly served with a summons and complaint herein and further, that his request for entry of default was not accompanied by an affidavit presenting proof of service as required by FRCP 55(a). Thereafter Carter filed a motion for new trial pursuant to FRCP 59.

In his moving papers to the motion for new trial Carter for the first time alleged that Certified had been served by personal service on August 1, 1990. Although Certified argued that the motion was improper based on procedural grounds, Certified also noted that it the court were included to consider Carter's motion as one for reconsideration, it should nevertheless be denied because, under the local rules, Carter had failed to establish good cause upon which such a motion may be granted.

Local Rule 7.16 of the Central District Court of California provides only three grounds upon which a motion for consideration may be granted: (1) a material difference in fact or law which, with reasonable diligence, could not have been presented to the court before the motion for reconsideration; (2) the emergence of new facts or law occurring after the prior decision was rendered; or (3) a manifest showing of failure by the court to consider material facts

presented before the prior decision was rendered. The "proof of service" submitted by Carter in his motion for new trial did not constitute new evidence which could not have been presented to the court before the motion, nor did it constitute new facts occurring after the decision was rendered. Likewise, there was no manifest showing by Carter of the court's failure to consider material facts presented before the decision was rendered since, as noted above, this "fact" was never presented by Carter to the court to begin with.

Carter did not file a reply or otherwise seek to refute the arguments or evidence presented in Certified's opposition. Rather, Carter filed a motion for reconsideration. Two days thereafter, the court denied Carter's motion for new trial, holding that he had not shown good cause for vacating the prior judgment.

The grounds upon which Carter based his motion for reconsideration were identical to those presented in his motion for new trial, attaching to his motion as an exhibit the same proof of service he had attached to the prior motion. Certified once again argued that Carter's "evidence" failed to satisfy the requirements of Local Rule 7.16. Further, the district court had already examined the facts presented in the motion for new trial and determined that they were insufficient to establish good cause for setting aside the November 26, 1990 order. Indeed, the court denied Carter's motion for reconsideration because he once again failed to establish good cause to vacate the prior order.

There is, therefore, no evidence to suggest that the there has been any misrepresentation of facts by Certified. Since September, 1990, it had consistently maintained that it had never been personally served, and Carter failed to present any facts or make any arguments to the contrary until he raised it in his motion for new trial. Indeed, if

there has been any "misrepresentation," it was due to Carter's own failure to timely apprise the Court of the facts of which he had knowledge.

III. The Ninth Circuit Court Of Appeals Properly Rejected Carter's Argument That The Default Should Not Have Been Set Aside.

As Certified noted in its Respondent's Brief submitted to the Ninth Circuit, Carter did not appeal from the order of the district court granting Certified's application for relief from entry of default. Rather, Carter only appealed from the order granting Certified's motion to dismiss.

Rule 3(c) of the Federal Rules of Appellate Procedure provides, in pertinent part, that "[t]he notice of appeal . . . shall designate the judgment, order or part thereof appealed from . . . ." It has been affirmatively determined that where an appellant specifies an order or judgment or part thereof from which the appeal is taken, the appellate court has no jurisdiction to review other judgments or portions thereof not so specified. Roberts v. College of the Desert, 870 F.2d 1411, 1418-1419 (9th Cir. 1989); Casella v. Webb, 883 F.2d 805, 807, n. 2 (9th Cir. 1989) (failure to indicate intent to appeal issue in notice of appeal precludes raising issue on appeal). See also, Torres v. Oakland Scavenger Co., 487 U.S. 312, 314-315, 108 S.Ct. 2405, 2408-2409, 101 L.Ed.2d 285 (1988) (failure to file notice of appeal in accordance with specificity requirement of FRAP 3(c) is a jurisdictional bar.)

In Roberts, the plaintiff had attempted to allege on appeal that the trial court had abused its discretion in denying her attorney fees. The defendant had argued, however, that the appellate court was without jurisdiction to review the order because Roberts had failed to refer to that order in her notice of cross-appeal. The court agreed

with the defendant and stated:

> "Although we have observed that it 'violates the spirit of the Federal Rules of Civil Procedure to avoid a decision on the merits on the basis of mere technicalities" [citation omitted], Roberts' oversight was more than a mere technicality. Her notice of cross-appeal was specifically limited to an appeal from the portion of the court's May 29, 1985 order entering judgment for the defendants in her Title VII claim. That order did not mention attorneys' fees at all. The [defendant's] notice of appeal referred only to the order filed September 19, 1985, denying the motion for new trial, and that order did not mention the attorneys' fees ruling either. In this case it cannot be fairly inferred that Roberts intended to challenge the attorney's fees ruling." [Citations omitted.] Id. at 1418.

Roberts had also tried to argue that no prejudice would result to the defendant since she indicated in her civil appeals docketing statement that part of the relief she sought was in attorney's fees. However, the court flatly rejected her argument and further noted that she did not brief the issue in any depth. Id.

In the present case, Carter filed his notice of appeal only as to the court's order of April 30, 1991 wherein the motion to dismiss was granted. That order addressed the motion to dismiss, a motion to introduce documents in the record and a motion for sanctions. Nowhere in the order was the motion vacating entry of default or the subsequent motions reviewing that order mentioned. Since Carter's notice of appeal failed to specify any order entered prior to the April 30, 1991, as was the case in Roberts, the Court of Appeals properly

letermined that it was without jurisdiction to review the matter.

Further, as Certified also noted in its Brief to the Ninth Circuit, lefault judgments are generally disfavored and, as a result, any loubts as to the propriety of a default are generally resolved against he party seeking a default judgment. Schwab v. Bullock's, Inc., 508 F.2d 353, 355 (9th Cir. 1974). In addition, the determination as to whether default shall be set aside rests on the sound discretion of the rial court. Madsen v. Bumb, 416 F.2d 4, 6 (9th Cir. 1969). The court's determination is not to be disturbed on appeal unless it ıppears that it has abused its discretion. Further, considerable weight is given to the district judge's decision on the motion because ıe is the person most familiar with the circumstances of the case and s in the best position to evaluate the good faith and credibility of the parties. See, for example, Madsen v. Bumb, 419 F.2d 4, 6-7 (9th Cir. 1969); Jackson v. Heiser, 111 F.2d 310 (9th Cir. 1940) (trial court apparently disbelieved statement of one of the defaulting parties).

These issues were all raised and presented to the Ninth Circuit. It cannot be said that the matters were not considered by the Court in rendering its decision. Indeed, a review of the decision rendered by the Ninth Circuit clearly reveals that it applied applicable law in determining that it could not review the order setting aside the default because Carter failed to raise it in his notice of appeal. (Appendix B, infra.)

Further, the Court of Appeals correctly applied In re San Vicente Medical Partners Ltd., 962 F.2d 1402, 1405 (9th Cir. 1991), cert. denied, 113 S.Ct. 210 (1992) in concluding that, although there was conflicting evidence before the district court, its factual determination that attempted service by mail has been defective and no other means of service had been attempted was not clearly erroneous.

(Appendix B, infra.)

IV. The Motion To Dismiss Was Properly Granted.

As quoted above, Rule 4(j) of the Federal Rules of Civil Procedure clearly places the burden upon the plaintiff to establish good cause for denying a motion to dismiss for failure to timely serve the summons and complaint. Fimbres v. United States, 833 F.2d 138, 139 (9th Cir. 1987); Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985) (Absent a showing of good cause, dismissal of the case is mandatory).

Relying on West Coast Theater Corp. v. Portland, 897 F.2d 1519, 1528 (9th Cir. 1990), the Ninth Circuit correctly applied the "abuse of discretion" standard in reviewing the district court's order of dismissal and clearly found there was no abuse of discretion. As the Ninth Circuit noted, since Carter failed to file any opposition whatsoever to the motion to dismiss, under the local rules, the district court could properly have deemed Carter to have consented to the motion. Further, the Court of Appeals noted that Carter failed to establish good cause for the failure to serve within 120 days. Carter has been placed on notice of Certified's contention that there had been a defect in service in September, 1990, but made no effort to correct the contention or perfect service. The Ninth Circuit further found that the granting of the motion to dismiss was nevertheless proper because Carter had failed to establish good cause. (Appendix B, infra.)

The facts therefore demonstrate that the Ninth Circuit appropriately applied and interpreted established law in affirming the decision of the district court. Carter's petition for writ of certiorari does not present any facts or argument to the contrary. The petition should therefore be denied on this basis as well.

CONCLUSION

The Ninth Circuit correctly determined that it was without jurisdiction to review the district court's order setting aside the default because Carter failed to raise the issue in his notice of appeal. The Ninth Circuit also applied the "abuse of discretion" standard in reviewing the decision of the district court granting the motion to dismiss. Carter has not presented any argument or evidence to the contrary.

For each and all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Dated: June 2, 1993

By: WENDY K. GENZ
Counsel of Record

Rexon, Freedman, Klepetar & Hambleton

CORPORATE LISTINGS

Pursuant to Rule 29.1 of the Supreme Court Rules, Certified hereby states that Certified Grocers of California, Ltd. is the parent corporation of two subsididaries, Grocers Specialty Co. and Grocers & Merchants Insurance Service. \

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VILFRED CARTER, Plaintiff-Appellant, v. CERTIFIED GROCERS OF CALIFORNIA, LTD.; ABE ABRAHAMIAN; GEORGE WHITMAN; CLAY DEVILLIER, Defendants-Appellees,	)	CASE NO. 91-55629 DC NO. CV-90-3981-WDK ORDER
VILFRED CARTER, Plaintiff-Appellee, v. CERTIFIED GROCERS OF CALIFORNIA, LTD., Defendant-Appellant.	)	NO. 91-55699

Filed April 6, 1993

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Before: D.W. NELSON, WIGGINS and LEAVY, Circuit Judges.

Plaintiff-Appellant's petition for rehearing, filed March 19, 1993, is hereby denied.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VILFRED CARTER,	)	CASE NO. 91-55629
Plaintiff-Appellant,	)	DC NO. CV-90-3981-WDK
v.	)	MEMORANDUM*
CERTIFIED GROCERS OF CALIFORNIA, LTD.; ABE ABRAHAMIAN; GEORGE WHITMAN; CLAY DEVILLIER,	)	
Defendants-Appellees,	)	
VILFRED CARTER,	)	NO. 91-55699
Plaintiff-Appellee,	)	
v.	)	
CERTIFIED GROCERS OF CALIFORNIA, LTD.,	)	
Defendant-Appellant.	)	

Filed March 8, 1993

Appeal from the United States District Court
For the Central District of California
William D. Keller, District Judge, Presiding

Submitted March 4, 1993**
Pasadena, California

Before: D.W. NELSON, WIGGINS, and LEAVY, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Wilfred Carter appeals pro se the district court's dismissal of his case pursuant to Fed. R. Civ. P. Rule 4(j). Certified Grocers of California, Ltd. cross-appeals the district court's denial of Rule 11 sanctions. We affirm the district court on both accounts.

I. BACKGROUND

Carter filed his complaint in the district court on July 27, 1998, claiming employment discrimination. He attempted to serve Certified Grocers soon thereafter.[3] In September, 1990, Carter requested and received entry of default against Certified Grocers. Certified Grocers moved to set aside the default, claiming the summons and complaint had not been properly served. On November 26, 1990, the district court granted Certified Grocers' motion.

Two and a half months later, Certified Grocers again asserted that it had not been properly served -- this time as part of a motion to dismiss pursuant to Fed. R. Civ. P. Rule 4(j), which requires that the summons and complaint be served within 120 days of filing. Carter never filed an opposition to this motion. On April 30, 1991, the district court granted the motion and the case was dismissed. Carter timely appealed to this court.

II. SERVICE ON CERTIFIED GROCERS

We review the district court's factual determinations for clear error. In re San Vicente Medical partners Ltd., 962 F. 2d 1402, 1405 (9th Cir.), cert. denied, 113 S. Ct. 210 1992. In its November 26, 1990 order setting aside the default, the district court found that the attempted service by mail was defective because the required

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[3]Carter named three individuals and Certified Grocers (his employer) as defendants, asserting claims under 42 U.S.C. §§ 1981 and 1983 and under state law. The district court dismissed the state law claims sua sponte and later dismissed the three individual defendants from the action. This appeal relates only to those claims which remained.

acknowledgement forms were missing, and that no other means of service had been attempted. Although there was conflicting evidence before the district court, we cannot say this factual determination was clearly erroneous.

III. CARTER'S APPEAL

As a preliminary matter, the decision to set aside the default is not properly before this court.[4] However, we note that relief from entry of default was proper because of inadequate service of the summons and complaint.

We turn now to the dismissal of Carter's case. Dismissal under Rule 4(j) is reviewed for abuse of discretion. West Coast Theater Corp. v. Portland, 897 F.2d 1519, 1528 (9th Cir. 1990). Carter filed no opposition to Certified Grocer's motion to dismiss. In light of his failure to oppose, the district court deemed Carter to have consented to the motion, as permitted by the Local Rule.[5] We cannot say the district court abused its discretion in granting Certified Grocer's unopposed motion.

Even if the district court's "deeming" of Carter's consent were

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[4]Carter does not raise this issue in his notice of appeal, nor does he argue the issue in his brief as filed; however Certified Grocer's brief addresses the issue at length. Presumably, this argument was raised in the version of the brief Carter first attempted to file, which was refused by the clerk because of errors in form.

Carter's notice of appeal refers only to the district court's order dated April 30, 1991. Neither the notice of appeal nor the April 30, 1991 order concerns the decision to set aside the default. Because Carter did not raise the issue in his notice of appeal, this court cannot review the order setting aside the default. Fed. R. App. P. Rule 3(c); Roberts v. College of the Desert, 870 F.2d 1411, 1418-1419 (9th Cir. 1989); Casella v. Webb, 883 F.2d 805, 807 n.2 (9th Cir. 1989).

[5]Local Rule 7.9 of the Central District of California says: "Papers not timely filed... may be deemed by the Court consent to the granting or denial of the motion, as the case may be" (emphasis added).

improper, we would nevertheless have to affirm. When proper service is not made within 120 days, Rule 4(j) requires dismissal without prejudice unless the plaintiff shows good cause for the failure to serve. Fed. R. Civ. P. Rule 4(j); Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985). In response to the motion to dismiss, Carter did not establish good cause for the failure to serve; in fact, he filed no opposition at all. Furthermore, Carter never attempted to perfect service after the issue was first raised, although he had more than two months in which to do so.[6] Since Carter did not show good cause for his failure to serve Certified Grocers within 120 days, dismissal under Rule 4(j) was appropriate.

IV. CERTIFIED GROCERS' CROSS-APPEAL

Certified Grocers cross-appeals the district court's denial of Rule 11 sanctions. We review the district court's decisions regarding Rule 11 sanctions for abuse of discretion. Cooter & Gell v. Hartmas Corp., 496 U.S. 384, 405 (1990). In denying sanctions in this case, the district court did not abuse its discretion in light of the fact that Carter appeared pro se.

AFFIRMED.

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[6] Certified Grocers first asserted the defect in service
ptember 13, 1990, when it objected by special appearance to
r's request for default judgment. The 120-day period
tted by Rule 4(j) did not expire until November 26, 1990.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 90-3981-WDK Date: April 30, 1991

Title: CARTER v. CERTIFIED GROCERS OF CALIFORNIA et al.

DOCKET ENTRY: Entered: Clerk, U.S. District Court
April 30, 1991
Central District of California

PRESENT:

Honorable WILLIAM D. KELLER, JUDGE

Sara Tse Deputy Clerk	None Present Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None Present	None Present

PROCEEDINGS:

Before the Court is Defendant's Motion to Dismiss pursuant to FRCP 4(j). Plaintiff has filed no opposition to this motion as required by Local Rule 7.6. Under Local Rule 7.9, the court deems Plaintiff's failure to file any opposition as a consent to the granting of Defendant's motion. Accordingly, Defendant's Motion

to Dismiss is GRANTED.

Accordingly, the Court need not reach Plaintiff's pending motion to Introduce Official Record in Evidence Pursuant to FRCP Rule 44. In response to this Court's Minute Order of March 8, 1991, Plaintiff refiled the motion, identifying the "Official Records" he seeks to introduce. For plaintiff's benefit, the Court notes, without so ruling, that the identified documents are already part of the official record in this case.

Defendant's motion for Rule 11 sanctions against plaintiff is DENIED.

IT IS SO ORDERED.

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WILLIAM D. KELLER
United States District Judge

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)